

² The Board notes that following the October 30, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP properly suspended appellant's wage-loss compensation and medical benefits pursuant to 5 U.S.C. § 8123(d), effective July 19, 2016, due to her failure to attend a scheduled medical examination.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decision and order are incorporated herein by reference. The relevant facts are as follows.

On September 18, 1990 appellant, then a 34-year-old forestry technician, filed a traumatic injury claim (Form CA-1) alleging that she sustained a back injury on April 17, 1990 when changing a vehicle tire while in the performance of duty. OWCP accepted her claim for lumbosacral strain, herniated disc L4-5, and subsequent microsurgical discectomy. Appellant made several attempts to return to work, but has not worked for the employing establishment since May 27, 1992.

On March 23, 2015 OWCP informed appellant that she would be referred for a second opinion examination, to assess her accepted work-related conditions. It noted that the time, date, and location of the appointment would be detailed in a separate letter. OWCP indicated that rescheduling the appointment date and time was strongly discouraged and should only be done in emergency situations. It instructed appellant, that if she failed to keep the scheduled appointment, she must advise it as to the reason within seven days in writing. OWCP noted that only a legitimate, documented emergency would be deemed as an adequate reason for not keeping the appointment. It informed appellant that, if she failed to provide an acceptable reason for not appearing for the examination, or if she obstructed the examination, her benefits would be suspended in accordance with section 8123(d) of FECA (5 U.S.C. § 8123(d)). OWCP noted that this provision delineated that, if an employee refused to submit to or obstructed an examination, his or her right to compensation was suspended until the refusal or obstruction stopped.

In a March 25, 2015 letter, OWCP advised appellant of an appointment scheduled for April 9, 2015 at 10:00 a.m. with Dr. Michael S. Clarke, a Board-certified orthopedic surgeon, for a second opinion evaluation of her work-related condition and provided his office address. It

³ *Order Remanding Case*, Docket No. 13-0649 (issued October 21, 2013); Docket No. 14-1588 (issued May 12, 2015).

requested that she call and provided a telephone number to confirm the appointment. Appellant did not attend the scheduled examination.

In an April 8, 2015 letter, OWCP advised appellant that her appointment with Dr. Clarke was rescheduled for April 23, 2015 at 9:30 a.m. It again provided his office address and requested that she call and provide a telephone number to confirm the appointment.

In an April 15, 2015 letter, appellant explained that she did not attend the April 9, 2015 appointment as she had another doctor's appointment scheduled for that day. In a second letter of even date, she explained that she had elected to receive Office of Personnel Management (OPM) retirement benefits as of April 6, 2015.

In an April 20, 2015 letter, OWCP noted receipt of appellant's election to receive "Civil Service Retirement System [Federal Employees Retirement System] (FERS) benefits as of April 6, 2015." It also noted that it had scheduled her for a second opinion medical examination with Dr. Clarke and that she failed to keep her initial appointment scheduled for April 9, 2015. OWCP advised appellant that it had rescheduled the appointment to April 23, 2015 and reminded her that failure to keep her scheduled doctor's appointment could result in suspension of her medical and compensation benefits. Appellant did not attend the scheduled April 23, 2015 examination with Dr. Clarke.

On April 28, 2015 OWCP issued a notice of proposed suspension of compensation and medical benefits for failure to attend the second opinion medical examination appointments on April 9 and 23, 2015 as directed. It afforded appellant 14 days to submit new and pertinent explanation in writing for not attending the examination with Dr. Clarke. OWCP advised her that, if good cause was not established, her entitlement to wage-loss compensation and medical benefits would be suspended in accordance with 5 U.S.C. § 8123(d). No additional evidence was received from appellant justifying her failure to attend either of Dr. Clarke's scheduled examinations.

By decision dated July 19, 2016, OWCP suspended appellant's wage-loss compensation and medical benefits pursuant to 5 U.S.C. § 8123(d), effective July 19, 2016, due to her failure to attend the second opinion examinations with Dr. Clarke which had been scheduled for April 9 and 23, 2015. It found that she did not provide good cause for her failure to appear for either examination within 14 days of OWCP's April 28, 2015 notice of proposed suspension. OWCP advised appellant that her benefits would be reinstated only after it had been verified that she attended and fully cooperated with an OWCP-directed second opinion examination and noted that such reinstatement would be effective the date of her compliance.

On May 23 and June 9, 2017 appellant requested reconsideration. In her May 23 and June 9, 2017 statements, she reiterated her reason why she did not attend the original appointment with Dr. Clarke on April 9, 2015. She indicated that she had notified OWCP that she had a previously scheduled appointment with her family physician, and that she had not thought to ask her doctor to write a note as to why she was unable to attend the April 9, 2015 appointment with Dr. Clarke. Appellant alleged that she could not attend the rescheduled April 23, 2015 appointment with Dr. Clarke as her vehicle broke down the evening of April 22, 2015 and it was towed for repair. She indicated that the repair of her vehicle took time as special parts were ordered

and she had no one to take her to the scheduled appointment, which was a four-hour plus drive. Appellant further noted that she had requested an election of OPM benefits.

By decision dated September 14, 2018, OWCP denied modification of the July 19, 2016 decision. It noted that appellant had contacted OWCP and provided a reason for not attending the April 9, 2015 examination with Dr. Clarke. However, she did not attend the rescheduled April 23, 2015 appointment with Dr. Clarke and did not contact OWCP to provide her reasons or request rescheduling of the appointment. OWCP also found that her explanation for not attending the rescheduled April 23, 2015 appointment, which was provided almost a year later, insufficient to overturn the suspension of her compensation.

In a May 28, 2019 statement, appellant indicated that she objected to the suspension of her compensation benefits because she might require further medical care. She noted that she was considering seeing a physician for her lumbar condition as her legs sometimes became numb. Appellant inquired whether she could elect OWCP benefits for one day to see a second opinion physician and then reelect OPM benefits the next day. She also inquired whether OWCP would provide transportation to a second opinion appointment. Appellant noted that she did not understand why she needed to see Dr. Clarke, as he was not a back doctor, and why OWCP would want her to see a second opinion physician as it knew she had elected OPM benefits.

In a July 17, 2019 memorandum of telephone call (Form CA-110), an OWCP claims examiner informed appellant that she did not have to elect FECA benefits to attend a second opinion examination. The claims examiner advised appellant that OWCP would refer her to a second opinion examiner and that she should receive an appointment within 30 to 45 days. She was also advised that OWCP could arrange transportation service from one of its vendors or she could try and obtain transportation and reimbursement from OWCP once she received the appointment letter.

In July 24 and 25, 2019 CA-110 forms, appellant indicated that she wanted to file a reconsideration request prior to rescheduling a second opinion examination. On July 25, 2019 she also stated that she may never attend a second opinion examination as she did not trust OWCP and their physicians.

On August 21, 2019 appellant requested reconsideration. In a narrative statement, she indicated that she was submitting evidence to verify why she did not attend Dr. Clarke's second opinion appointments. Appellant expressed frustration with OWCP's handling of her election OPM benefits and her belief that it caused the suspension of her OWCP benefits. She also advised that the reason she elected OPM benefits was so she no longer had to deal with OWCP.

A May 4, 2015 patient message to Dr. Edward R. Henegar, a family medical specialist, noted appellant's report of side effects with the use of medication. It also noted that appellant had no transportation available. An unsigned handwritten note indicated "my vehicle was still at Greg's Auto -- that's why I had no transportation." An April 22, 2015 receipt from Ed's Towing

& Garage indicated that appellant's vehicle was towed to Greg's Auto garage at 8:29 p.m. that day.

In an explanation of benefits statement, Mail Handler's Benefit Plan (MHBP) indicated a bill for an office visit on April 9, 2015 at the Ozarks Medical Center.

By decision dated October 30, 2019, OWCP denied modification of its September 14, 2019 decision.

LEGAL PRECEDENT

Section 8123(a) of FECA authorizes OWCP to require an employee, who claims disability as a result of federal employment, to undergo a physical examination as it deems necessary.⁴ The determination of the need for an examination, the type of examination, the choice of locale, and the choice of medical examiners are matters within the province and discretion of OWCP.⁵ OWCP's regulations provide that a claimant must submit to an examination by a qualified physician as often and at such times and places as OWCP considers reasonably necessary.⁶ Section 8123(d) of FECA and OWCP regulations provide that, if an employee refuses to submit to or obstructs a directed medical examination, his or her right to compensation is suspended until the refusal or obstruction stops.⁷ OWCP's procedures provide that, before OWCP may invoke these provisions, the employee is to be provided a period of 14 days within which to present in writing his or her reasons for the refusal or obstruction.⁸ If good cause for the refusal or obstruction is not established, entitlement to compensation is suspended in accordance with section 8123(d) of FECA.⁹

ANALYSIS

The Board finds that OWCP properly suspended appellant's wage-loss compensation and medical benefits pursuant to 5 U.S.C. § 8123(d), effective July 19, 2016, due to her failure to attend a scheduled medical examination.

In letters dated March 23 and 25, 2015, OWCP notified appellant that she was being referred for a second opinion examination to assess her accepted work-related condition. The March 25, 2015 letter specifically advised her that the examination was scheduled with Dr. Clarke for April 9, 2015 at 10:00 a.m. and provided the office address for Dr. Clarke's office. In the

⁴ 5 U.S.C. § 8123(a).

⁵ *C.R.*, Docket No. 20-1089 (issued January 26, 2021); *L.B.*, Docket No. 17-1891 (issued December 11, 2018); *J.T.*, 59 ECAB 293 (2008).

⁶ 20 C.F.R. § 10.320.

⁷ 5 U.S.C. § 8123(d); *id.* § 10.323; *C.R.*, *supra* note 5; *D.K.*, Docket No. 18-0217 (issued June 27, 2018).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.13d (September 2010).

⁹ *Id.* at Chapter 2.810.13e.

March 23, 2015 letter, OWCP informed appellant of her obligation to attend and cooperate with the examination. It clearly explained that her compensation benefits would be suspended for failure to report to or for obstruction of the examination. While appellant did not appear for the April 9, 2015 appointment, she provided an explanation as to why she was unable to attend the appointment. OWCP rescheduled the examination with Dr. Clarke for April 23, 2015 at 9:30 a.m. and again provided his address. In an April 20, 2015 letter, it acknowledged receipt of appellant's election to receive FERS benefits. OWCP also indicated that it had rescheduled appellant's second opinion medical examination appointment with Dr. Clarke to April 23, 2015 and reminded her that failure to keep her scheduled doctor's appointment could result in suspension of her medical and compensation benefits. Appellant did not appear for the April 23, 2015 appointment, nor did she provide evidence within 14 days of OWCP's April 28, 2015 notice of proposed suspension that she attempted to reschedule the appointment prior to the designated time.

In its April 28, 2015 notice, OWCP provided appellant 14 days to submit a valid reason for her failure to attend the scheduled medical appointment. As appellant did not respond to OWCP's April 28, 2015 notice, by decision dated July 19, 2016, OWCP suspended appellant's wage-loss compensation and medical benefits pursuant to 5 U.S.C. § 8123(d), effective that day, due to her failure to attend the second opinion examinations with Dr. Clarke scheduled for April 9 and 23, 2015.

Almost a year after OWCP's July 19, 2016 suspension of wage-loss compensation and medical benefits, on May 23 and June 9, 2017, appellant indicated that she had notified OWCP why she could not attend the April 9, 2015 appointment and that she did not think to get her doctor, whom she saw that day, to write a note. The Board notes that appellant had informed OWCP in an April 15, 2015 letter that she had another doctor's appointment scheduled for that day and that OWCP rescheduled the appointment with Dr. Clark for April 23, 2015. OWCP also subsequently received, on August 27, 2019, documentation from appellant's insurance company that she was seen at a medical provider's office on April 9, 2015. As it rescheduled appellant's appointment with Dr. Clarke for April 23, 2015, the issue at hand is whether appellant obstructed the April 23, 2015 appointment.

Appellant alleged in her May 23 and June 9, 2017 letters that she could not attend the rescheduled April 23, 2015 appointment with Dr. Clarke as her car broke down the night before, it was being repaired, and she had no transportation to get to the appointment. On August 27, 2019 OWCP received a tow receipt for April 22, 2015 from Ed's Towing and Garage. This document indicates that appellant had a vehicle towed the night before her April 23, 2015 scheduled appointment with Dr. Clarke. The Board notes, however, that this document was not received within 14 days of OWCP's proposed notification of suspension and the document itself does not present a clear basis to find that appellant had good cause for failing to appear for the scheduled examination on April 23, 2015.¹⁰ There is also no evidence that appellant had no other transportation to attend the scheduled examination on April 23, 2015.

¹⁰ See *R.L.*, Docket No. 20-0160 (issued October 30, 2020); see generally *D.K.*, Docket No. 14-0933 (issued April 15, 2015) (the Board found that OWCP properly suspended compensation where appellant did not submit any medical or factual evidence showing her inability to travel to the second opinion appointment by any mode of transportation other than driving or that she could not take breaks in her driving to the scheduled appointment).

Additional statements from appellant do not provide an explanation as to why she did not attend the April 23, 2015 appointment, why she did not attempt to contact OWCP after failing to attend the April 23, 2015 appointment, and whether she intended to cooperate with an OWCP second opinion examination. In July 24 and 25, 2019 CA-110 forms, appellant indicated that she wanted to file a reconsideration request prior to rescheduling a second opinion examination. In the July 25, 2019 Form CA-110, she indicated that she may never attend a second opinion examination as she did not trust OWCP and their physicians. This evidence does not indicate that appellant intends to cooperate with an OWCP second opinion examination.

The Board, therefore, finds that while appellant's August 21, 2019 statement provided some explanation as to why she did not attend the April 23, 2015 scheduled examination, there is no explanation as to why she did not attempt to contact OWCP after failing to attend the appointment. Section 8123(d) of FECA provides that, if an employee refuses to submit to or obstructs a directed medical examination, his or her right to compensation is suspended until the refusal or obstruction stops.

As appellant did not attend the April 23, 2015 examination as scheduled and failed to provide good cause for failing to appear within 14 days of OWCP's April 28, 2015 notice of proposed suspension, the Board finds that OWCP properly suspended her entitlement to wage-loss compensation and medical benefits in accordance with 5 U.S.C. § 8123(d), effective July 19, 2016.¹¹

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

¹¹ See *R.L.*, *id.*

CONCLUSION

The Board finds that OWCP properly suspended appellant's wage-loss compensation and medical benefits pursuant to 5 U.S.C. § 8123(d), effective July 19, 2016, due to her failure to attend a scheduled medical examination.

ORDER

IT IS HEREBY ORDERED THAT the October 30, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 3, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board